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In the

Supreme Court of the United States

October Term, 1958

No. [redacted] 113

ELLIS B. GRADY, JR., ADMINISTRATOR, C. T. A., OF MARGARETTE W. RODGERS, DECEASED,
Petitioner

v.

RICHARD EUGENE IRVINE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
HOW THE FEDERAL QUESTION AROSE	2
SUMMARY STATEMENT OF THE MATTER INVOLVED	2
QUESTION PRESENTED	3
The Sole Question Presented Is Whether the Substitution of the Administrator in the Place and Stead of the Plaintiff Destroyed the Jurisdiction of the Court	3
ARGUMENT	3
Point I — Diversity of Jurisdiction Having Existed at the Commencement of the Action, the Subsequent Change of Citizenship of the Plaintiff Did Not Oust It	3
CONCLUSION	7

TABLE OF CASES

Mercer v. City of Richmond, 152 Va. 736, 744, 148 S. E. 803, 805	6
Smith v. Sperling, 117 F. Supp. 781, 77 S. Ct. Rep. 1113, 1114	3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on the 8th day of April, 1958.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia (not yet reported) is found on page 4-b of the transcript, being pages 6 to 15, both inclusive, of the printed Appendix to appellant's brief filed in the Court of Appeals. The opinion of the Court of Appeals (not yet reported) is found on page 3 of the transcript.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 8, 1958. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1); jurisdiction having been originally obtained upon the ground of diversity of citizenship. Constitution, Article III, Section 2; United States Code Annotated, Title 28, Section 1332(1).

HOW THE FEDERAL QUESTION AROSE

Petitioner's decedent departed this life after having filed this suit in the District Court. Before it was determined, decedent died and petitioner qualified as her personal representative and sought to continue the litigation. The judgment below denied the petitioner the right to continue litigation and dismissed the case on the ground that when petitioner came into the case the jurisdiction of the Court was destroyed because petitioner and the defendant were citizens of the same state.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Margarette W. Rodgers, appellant, a citizen of the State of Maryland, was seriously and permanently injured on October 29, 1955, when she was struck by an automobile driven by appellee, Richard Eugene Irvine, a citizen of the State of Virginia, while she was walking across Main Street in the City of Waynesboro, Virginia.

In January, 1957, she filed her complaint against Irvine in the United States District Court for the Western District of Virginia at Harrisonburg for the recovery of damages for her injuries. On February 9, 1957, Irvine filed his answer.

Subsequently, while the suit was pending, the plaintiff died and Ellis B. Grady, Jr., as administrator, c.t.a., of the plaintiff filed his motion to be substituted for the plaintiff. Grady is a citizen of the State of Virginia. The District Court allowed the substitution, but after allowing the substitution, then of its own motion, dismissed the action upon the ground that diversity of citizenship no longer existed since both the Administrator and the defendant were citizens of the State of Virginia.

QUESTION PRESENTED

The sole question presented is whether the substitution of the administrator in the place and stead of the plaintiff destroyed the jurisdiction of the Court.

ARGUMENT

Point I

Diversity of Jurisdiction Having Existed At the Commencement of the Action, the Subsequent Change of Citizenship of the Plaintiff Did Not Oust It.

The general rule on this subject is that Federal jurisdiction depends on the facts as they exist at the time the action is commenced. It is not conferred or divested by later changes. Loss of diversity of citizenship through substitution of one party for another does not destroy jurisdiction. This principle applies where, at the time of the filing, there is diversity of citizenship between the plaintiff and the defendant, and the plaintiff dies and his administrator who is substituted for him, is a citizen of the same state as the defendant.

The principle, with the citation of many authorities, is well stated by Judge Mathes, District Judge, in *Smith* v. *Sperling*, 117 F. Supp. 781, from which we quote as follows:

"As the parties were aligned by plaintiff, complete diversity of citizenship appeared from the face of the complaint upon commencement of the action. Pacific R. Co. v. Ketchum, 1879, 101 U. S. 289, 298, 25 L. Ed. 932. Prior to trial the original plaintiff, New York citizen Edward S. Birn, died and the Probate Court of California appointed Charles B. Smith as Special Administrator of the estate. Cal. Prob. Code, §§460, 463. Smith, a citizen of California, was thereupon substituted as party plaintiff. Fed. Rules Civ. Proc. rule 25(a), 28 U. S. C. A.

"Where diversity jurisdiction exists at the commencement of an action, a subsequent change of citizenship of one of the parties does not oust it. Wichita R. R. & Light Co. v. Public Utilities Comm., 1922, 260 U. S. 48, 53-54, 43 S. Ct. 51, 67 L. Ed. 124; Louisville N. A. & C. Ry. Co. v. Louisville Trust Co., 1899, 174 U. S. 552, 566, 19 S. Ct. 817, 43 L. Ed. 1081; Clarke v. Mathewson, 1838, 12 Pet. 164, 37 U. S. 164, 171, 9 L. Ed. 1041; Dunn v. Clarke, 1834, 8 Pet. 1, 33 U. S. 1, 2, 8 L. Ed. 845; Mullen v. Torrance, 1824, 9 Wheat. 537, 22 U. S. 537, 538. It follows then that while the citizenship of the administrator at bar would have been a factor if he had originally brought the action, his citizenship as substituted party plaintiff is held not to affect determination as to diversity jurisdiction. See Continental Life Ins. Co. v. Rhoads, 1886, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380; Blake v. McKim, 1880, 103 U. S. 336, 26 L. Ed. 563; Amory v. Amory, 1877, 95 U. S. 186, 24 L. Ed. 428; Rice v. Houston, Adm'r., 1871, 13 Wall. 66, 80 U. S. 66, 21 L. Ed. 484; cf. Jeffcott v. Donovan, 9 Cir., 1943, 135 F. 2d 213."

This case was before the Circuit Court of Appeals for the Ninth Circuit, 237 F. 2d 317. Due to the re-alignment of the parties and other procedures it was not necessary for the Circuit Court of Appeals to expressly pass upon this question. However, the case was appealed by one of the

parties to the United States Supreme Court and was there decided on June 10, 1957, 354 U. S. 91, 77 Sup. Ct. Rep. 1112. The Court apparently considered the question here presented so well-settled that it deserved attention only in a footnote in relation to the history of the case. We quote from the footnote at pages 1113 and 1114 of 77 Sup. Ct. Reporter:

> "1. While the action was pending plaintiff died and for him a special administrator has been substituted. The latter is a citizen of California.
>
> "Had the suit been originally commenced by the decedent's representative, it would have been the citizenship of the representative which would have been determinative of jurisdiction in this diversity case. See Chappedelaine v. Dechenaux, 4 Cranch 306, 2 L. Ed. 629; Childress v. Emory, 8 Wheat. 642, 669, 5 L. Ed. 705; Mexican Central R. Co. v. Eckman, 187 U. S. 429, 434, 23 S. Ct. 211, 213, 47 L. Ed. 245; Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183, 186, 52 S. Ct. 84, 85, 76 L. Ed. 233. But jurisdiction, once attached, is not impaired by a party's later change of domicile. Mullen v. Torrance, 9 Wheat. 537, 6 L. Ed. 154. As Chief Justice Marshall said in that case: 'It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events.' Id., 9 Wheat. at page 539. The rationale, that jurisdiction is tested by the facts as they existed when the action is brought, is applied to a situation where a party dies and a non-diverse representative is substituted. Dunn v. Clarke, 1834, 8 Pet. 1, 8 L. Ed. 845."

There are other cases to the same effect in the reports of the District Courts and the United States Courts of Appeals, but since the highest Court of the land has thus expressed

itself upon the question so recently, we think it would be a work of superogation to cite and quote from those cases.

Rules 24(c) and 25(a) of the Federal Rules of Civil Procedure expressly provide for the procedure which was followed in this case. While State rules of procedure are not controlling in the Federal Court, they nevertheless show the theory of the amended Complaint of Substitution. In *Mercer v. City of Richmond*, 152 Va. 736, 744, 148 S. E. 803, 805, the Court said, referring to Section 8-628.1 of the Code of Virginia:

> "That section provides in effect that 'no cause of action' for injury shall be lost (as it would have been at common law) because of the death of the person injured, but in an action for damages for the injury there shall be no recovery for mental anguish, pain or suffering. If it had been the legislative purpose to exclude from the rule thus laid down, actions that had been brought during the life of the deceased and revived in the name of his personal representative under section 8-640, it would have been easy to provide for that. On the contrary, the statute as written deals with the cause of action and takes away an element of the cause of action whether the action therefor is begun by the injured person in his lifetime or by his personal representative after his death, as a condition of allowing the right of action for that cause *to survive*." (Italics supplied)

In dealing with cases where the injured person dies pending the action, the Court repeatedly uses language "permitting the revival of an action for personal injuries" where the person dies pending the action; "the revived action"; "the right of revival of actions for injuries"; "revived in the name of his personal representative."

CONCLUSION

In conclusion, we submit, with deference, and yet with confidence, that whatever may be the nature of the action as originally brought, when the plaintiff dies pending the action, the procedure provided by statute and rule of Court provides for a revival of the cause of action which the injured person had and therefore, the fact that the administrator substituted for the plaintiff in such a revived cause of action is a citizen of the same state as the defendant does not oust the jurisdiction of the Court properly acquired in the first instance.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Geo. E. Allen, attorney for Ellis B. Grady, Jr., Administrator, c. t. a., of Margarette W. Rodgers, deceased, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of June, 1958, I served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, on Respondent, by mailing 2 copies

in a duly addressed envelope, first class postage prepaid, to Wayt B. Timberlake, Esquire, attorney for Richard Eugene Irvine, Industrial Loan Building, Staunton, Virginia.

GEO. E. ALLEN
Attorney for Petitioner

SUPREME COURT. U. S.
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Respondent

APPENDIX TO PETITION FOR CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7584

Ellis B. Grady, Jr., Administrator, c.t.a.,
of Margarette W. Rodgers, deceased,
Appellant,

versus

Richard Eugene Irvine,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT HARRISONBURG

(Argued March 3, 1958. Decided April 8, 1958.)

Before PARKER, Chief Judge, and SOBELOFF and HAYNSWORTH, Circuit Judges.

Geo. E. Allen, and Allen, Allen, Allen & Allen on brief, for Appellant, and Wayt B. Timberlake, Jr., for Appellee.

Opinion

HAYNSWORTH, Circuit Judge:

This action was commenced in the District Court for the Western District of Virginia by a citizen of Maryland against a citizen of Virginia for the recovery of damages

for personal injury. During the pendency of the action, the plaintiff died as a result of the injuries sustained in the accident. Counsel for the plaintiff then filed a motion to substitute, as plaintiff, a citizen of Virginia, the duly appointed administrator c.t.a. of the estate of the original plaintiff, and to amend the complaint, pursuant to the requirements of Section 8-640 of the Code of Virginia, so as to convert the action into one for wrongful death under Sections 8-633-4. Upon its own initiative, the District Court raised the question of jurisdiction and concluded, after consideration, that the motion to substitute the personal representative as plaintiff and to amend the complaint should be granted, but, there being no longer diversity of citizenship, the action should be dismissed for want of jurisdiction. The plaintiff has appealed from the order of dismissal.

It is settled that where a personal representative initially files an action for wrongful death, it is the residence of the representative, not that of his decedent, which is relevant in the resolution, for purposes of federal jurisdiction, of the question of diversity of citizenship. *Mecom v. Fitzsimmons Drilling Company*, 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233. That this action for wrongful death was commenced by an allowance of an amendment to the pleadings in a pending action of a different nature rather than by the filing of a new complaint and the service of original process, does not make the residence of the personal representative irrelevant or that of his decedent determinative of the jurisdictional question.

For purposes of federal jurisdiction, the requirement of diversity of citizenship is ordinarily determined by the situation existing at the time the action is commenced. Once federal jurisdiction has attached, it is not defeated by a

subsequent change in the citizenship of one of the parties, *Mollen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154, nor by a formal substitution of a personal representative of non-diverse citizenship for an original party who dies while the cause is pending. *Smith, Admr.* v. *Sperling*, 354 U. S. 91, 77 S. Ct. 1112, 1 L. Ed. 2d 1205. There is great difference, however, between a formal substitution of a personal representative to prosecute the action in aid of the same right asserted by his decedent and an amendment or supplemental bill which changes the nature of the right asserted and alters the substance of the action. In the latter instance, jurisdiction should be re-examined in the light of the citizenship of all of the indispensable parties including those introduced upon allowance of the new pleading. See 4 Moore's Federal Practice, 2nd Ed., 25.05. It is analogous to the rule which calls for a re-examination of the diversity requirement after the joinder of an indispensable party. See Rule 19(b), Federal Rules of Civil Procedure; *Schwartz* v. *Metropolitan Life Insurance Co.*, D. Mass., 2 FRD 167; *Small* v. *Frick*, E. D., S. C., 40 F. Supp. 778; *Crecelius* v. *New Albany Mach. Mfg. Co.*, 7 Cir., 4 F. 2d 369; *Cohen* v. *Baltimore Casualty Co. of Baltimore*, E. D., S. C., 4 F. 2d 564; *Atwood* v. *Rhode Island Hospital Trust Co.*, 1 Cir., 275 F. 513; *Fryer* v. *Weakley*, 8 Cir., 261 F. 509; *Hines* v. *Schmehl*, 3 Cir., 257 F. 69; *Patterson* v. *Delaware & Hudson Co.*, 3 Cir., 251 F. 255; *Howes* v. *First Nat. Bank of Madison*, 8 Cir., 229 F. 51.

The statutes of Virginia do not, in any real sense, provide for the survival of a right of action for personal injury if the injured person dies as a result of the injury. Sections 8-628.1 and 8-640 of the Code of Virginia provide:

(8-628.1) "* * * No cause of action for injuries to person or property shall be lost because of the

death of the person in whose favor the cause of action existed, provided, however, in such action no recovery can be had for mental anguish, pain, or suffering * * *."

(8-640) "* * * (A)nd where an action is brought by a person injured for damage caused by the wrongful act, neglect or default of any person or corporation and the person injured dies pending the action, the action shall not abate by reason of his death, but, his death being suggested, it may be revived in the name of his personal representative. If the death resulted from the injury, the motion for judgment and other pleadings shall be amended so as to conform to an action under Sects. 8-633 and 8-634 and the case proceeded with as if the action had been brought under such sections. But in such cases there shall be but one recovery for the same injury."

But the Supreme Court of Virginia, interprets the terms "course of action" and "action," as used in these statutes, as encompassing only such rights of action as are otherwise granted or contemplated by statute. They do not include every right of action which, at any time, may have existed as a result of the tortious conduct. Unlike the courts of many other states,[1] the Supreme Court of Virginia construes its wrongful death statute as creating no new "cause of action" but a "right of action" where no right before existed. The "cause of action" is said to be complete and accrued the moment the tort is committed, but the "right of action" for wrongful death does not arise during the continued life of the injured person, nor does the injured person's "right of action" for personal injury survive his death, if death results from the injury. *Anderson* v. *Hygeia*

[1] See 16 Am. Jur. 48-51.

Hotel Co., 92 Va. 687, 24 S. E. 269; *Beavers* v. *Putnam*, 110 Va. 713, 67 S. E. 353; *Virginia Iron, Coal & Coke Co.* v. *Odle's Adm'r.*, 128 Va. 280, 105 S. E. 107; *Mercer* v. *City of Richmond*, 152 Va. 736, 148 S. E. 803; *Seymour & Burford Buick Corporation* v. *Richardson*, 194 Va. 709, 75 S. E. 2d 77; *Ruebush* v. *Funk*, 4 Cir., 63 F. 2d 170; *Atlantic Greyhound Lines, Inc.* v. *Keese*, D. C. Cir., 111 F. 2d 657. The Supreme Court of Virginia in *Anderson* v. *Hygeia Hotel Co.*, supra, said:

> "The language of the act clearly indicates that the Legislature had in view the rule of the common law; and that its purpose in passing the act was to provide for the case of an injured person, who had a good cause of action, but died from injuries without having recovered his damages. It is intended to withdraw from the wrong-doer the immunity from civil liability which the rule of the common law afforded him, and to provide for the recovery of such damages, notwithstanding the death of the injured person. *In so doing, however, it plainly did not intend to continue or cause to survive his right of action for the injury, but to substitute for it and confer upon his personal representative a new and original right of action.*" (citing cases)
>
> "*It is very clear that this new right of action, though founded upon a wrong already actionable by existing law in favor of an injured person for his damages, was not intended to be, and is not, a derivative one.* * * *" (Italics added)

Since the adoption of §8-628.1, it may be that some elements of the right of action for personal injury, in some circumstances, survive the death of the injured person, but

the conclusion of the Supreme Court of Virginia that they do not when the injured person dies as a result of his injurie after commencing action seems to be required by the provisions of §8-640. That section requires a conversion of the action into one brought under §§8-633-4, the wrongful death statutes, and all further proceedings must be as if the action had been filed initially under the wrongful death act. It was a motion to thus convert the present action which resulted in the order of dismissal for want of jurisdiction.

The wrongful death statutes of Virginia authorize compensation not for the economic and other loss suffered by the injured person, but for that of the statutory beneficiaries by reason of the death. Any recovery is an asset in the hands of the statutory beneficiaries, not of the general estate of the decedent, and, by express statutory provision, damages recovered are beyond the reach of the decedent's creditors. The right of action for wrongful death does not accrue until the death. It is granted by the statute directly for the benefit of the statutory beneficiaries, and is, in no sense, derived from the fatally injured person.

The conversion of an action for personal injury into one for wrongful death is much more than a formal substitution of a party under Rule 25(a), Federal Rules of Civil Procedure. Allowed as a supplemental bill under Rule 15(d), it was such a new and different action, in complete substitution for the old and for the benefit of persons having no interest in the former action, as to call for a new determination of the basis of federal jurisdiction.

The new action which, alone, the plaintiff nows seeks to prosecute, if initially filed as such, under no circumstances could have been prosecuted by any one in the federal jurisdiction in Virginia. The defendant is a citizen of Virginia;

and Virginia requires that the personal representative who prosecutes an action under its wrongful death act must be a resident of that state. This requirement has been held to be binding in the Federal Courts. *Holt* v. *Middlebrook*, 4 Cir., 214 F. 2d 187. See also *Rybolt* v. *Jarrett*, 4 Cir., 112 F. 2d 642. Such restrictions upon the exercise of the powers of a foreign administrator may not be applicable to a purely formal substitution of a party under Rule 25(a), *Neiman-Marcus Company* v. *Lait*, S. D., N. Y., 17 FRD 119, but, if applicable to original proceedings in the Federal Courts, the rule of Holt v. Middlebrook would seem equally applicable when a new party, by motion, comes into court for the first time to assert, in his own right or that of other new claimants, a claim for relief which is not dependent upon the pending proceeding nor derived from anyone who, at any time, was a party to the pending proceeding. Thus, the motion made was to substitute, as plaintiff, a citizen of Virginia, and no other alternative was considered or suggested.

We conclude that the District Court was entirely correct in granting the motion, as made, and thereupon, the parties being citizens of the same state, dismissing the action for want of jurisdiction.

Affirmed.[2]

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[2] The late Chief Judge John J. Parker expressed his approval of the result in the foregoing case, but the opinion, written after his death on March 17, 1958, did not receive his consideration.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel for the appellee.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

April 8, 1958

Clement F. Haynsworth, Jr.
United States Circuit Judge

Filed April 8, 1958
R. M. F. Williams, Jr., Clerk